

“Input Tax Credit - Analysis of Relevant Amendments in Finance Act 2020 & Controversial Issues”



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Section 16(4) – Time period for availing Input Tax Credit (ITC)

Current provisions	Amended Provisions	Effect
<p><i>A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.</i></p>	<p><i>A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.</i></p>	<p>Seeks to delink the date of issuance of debit note from the date of issuance of the underlying invoice for purposes of availing ITC.</p> <p>Since, Section 16(4) of the CGST Act 2017 restricts the ITC beyond due date of filing return for the month of September of the corresponding financial Year.</p> <p>Now last date of taking the ‘input tax credit’ will be the due date of the September return of the subsequent financial year to which the debit note pertains and it will not be linked with date of Invoice.</p>

Section 122 – Penalty for Certain Offences

Current provisions	Amended Provisions	Effect
<p>Section 122 Sub Section (1) of the CGST Act contains clauses (i to xxi) to provide penalty for certain offences. Clause (i), (ii), (vii) and (ix) of Section 122(1) levy of penalty on ‘taxable person’ for following offences:</p> <p>(i) Making supply without invoice or on false or incorrect invoice</p> <p>(ii) Issuing invoice without supply</p> <p>(vii) Taking or utilizing ITC without actual receipt of supply</p> <p>(ix) Taking or distributing ITC in contravention of ISD provisions.</p>	<p><i>New Sub Section (1A) has been introduced after Sub-Section (1):</i></p> <p><i>(1A) Any person who <u>retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted</u>, shall be liable to a penalty of an amount <u>equivalent to the tax evaded or input tax credit availed of or passed on</u>.</i></p>	<p>Seeks to insert a new sub-section (1A) so as to make the beneficiary of certain transactions at whose instance such transactions are conducted liable for penalty.</p>

Section 132(1) – Punishment for Certain Offences

Current provisions	Amended Provisions	Effect
<p>(1) Whoever commits any of the following offences, namely:-</p> <p>a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;</p> <p>(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;</p> <p>(c) avails input tax credit using such invoice or bill referred to in clause (b);</p> <p>(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;</p> <p>(e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);</p>	<p>(1) Whoever commits, or <u>causes to commit and retain the benefits</u> arising out of, any of the following offences</p> <p>a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;</p> <p>(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;</p> <p>(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill</p> <p>(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;</p> <p>(e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);</p>	<p>Section 132 of the CGST Act is being amended to make the offence of fraudulent availment of input tax credit without an invoice or bill a cognizable and non-bailable offence; and to make any person who commits, or causes the commission, or retains the benefit of transactions arising out of specified offences liable for punishment.</p>

Section 140 – Transitional Arrangements for ITC

Current provisions	Amended Provisions	Effect
<p>Sub-Section (1): <i>A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:</i></p> <p>Sub-Section (2): <i>A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:</i></p>	<p>Sub-Section (1): <i>A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such</i></p> <p>Sub-Section (2): <i>A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed:</i></p>	<p>Seeks to amend Section 140 relating to transitional arrangements for ITC, so as to prescribe the time limit and the manner for availing ITC against certain unavailed credit under the existing law.</p> <p><u>This amendment shall take effect retrospectively from July 1, 2017.</u></p>

Section 140 – Transitional Arrangements for ITC

Current provisions	Amended Provisions	Effect
<p>Sub-Section (3): <i>A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—</i></p> <p>.....</p>	<p>Sub-Section (3): <i>A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or <u>finished goods held in stock on the appointed day, within such time and in such manner as may be prescribed</u>, subject to the following conditions, namely:—</i></p>	<p>Seeks to amend Section 140 relating to transitional arrangements for ITC, so as to prescribe the time limit and the manner for availing ITC against certain unavailed credit under the existing law.</p> <p><u>This amendment shall take effect retrospectively from July 1, 2017.</u></p>

Section 140 – Transitional Arrangements for ITC

Current provisions	Amended Provisions	Effect
<p>Sub-Section (5):</p> <p><i>A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period Of thirty days from the appointed day:</i></p> <p>.....</p>	<p>Sub-Section (5):</p> <p><i>A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, within such time and in such manner as may be prescribed, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day</i></p>	<p>Seeks to amend Section 140 relating to transitional arrangements for ITC, so as to prescribe the time limit and the manner for availing ITC against certain unavailed credit under the existing law.</p> <p><u>This amendment shall take effect retrospectively from July 1, 2017.</u></p>

Section 140 – Transitional Arrangements for ITC

Current provisions	Amended Provisions	Effect
<p>Sub-Section (6): <i>A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—</i></p> <p>Sub-Section (7): <i>Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.</i></p>	<p>Sub-Section (6): <i>A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to the following conditions, namely:—</i></p> <p>Sub-Section (7): <i>Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act, within such time and in such manner as may be prescribed, even if the invoices relating to such services are received on or after the appointed day.</i></p>	<p>Seeks to amend Section 140 relating to transitional arrangements for ITC, so as to prescribe the time limit and the manner for availing ITC against certain unavailed credit under the existing law.</p> <p><u>This amendment shall take effect retrospectively from July 1, 2017.</u></p>

Section 140 – Transitional Arrangements for ITC

Current provisions	Amended Provisions	Effect
<p>Sub-Section (8): <i>Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:</i></p> <p>Sub-Section (9): <i>Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.</i></p>	<p>Sub-Section (8): <i>Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed:</i></p> <p>Sub-Section (9): <i>Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such <u>credit can be reclaimed</u> within such time and in such manner as may be prescribed, subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.</i></p>	<p>Seeks to amend Section 140 relating to transitional arrangements for ITC.</p> <p><u>This amendment shall take effect retrospectively from July 1, 2017.</u></p>

UNDERSTANDING THE MEANING OR DEFINITION & CONCEPTS OF RELEVANT TERMS

1. **OUTWARD SUPPLY**- Outward supply in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, license, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business.
2. **INWARD SUPPLY**- Inward supply in relation to a person, shall mean receipt of goods or services or both whether by purchase, acquisition or any other means with or without consideration.
3. **TAXABLE VALUE**- Final value on which tax is levied. Value of supply of Goods or Services used in determining amount of tax the tax-payer will pay.
4. **REGISTERED PERSON**- Person who is registered under section 25 but does not include a person having a Unique Identity Number. Every person liable to tax must register in GST in its state or union territory in accordance to the procedure for registration provided under Sec 25 of CGST Law.

REFERENCE: CGST Act 2017, S. 2 (83); CGST Act 2017, S. 2 (67) ; The black laws Dictionary 2nd ed. ; CGST Act 2017, Sec. 2 (94)

UNDERSTANDING THE MEANING OR DEFINITION & CONCEPTS OF RELEVANT TERMS

5. **B2B**- Business to Business. This is where the transfer or supply is from a registered entity (Business) to another registered entity (other business).
6. **ZERO RATED SUPPLY** – Zero rated supply is the supply on which 0% of GST is to be discharged while making an outward supply of goods, e.g. Supply made for exports of goods or services under GST. Entity gets the ITC on inputs used for making such supplies subject to ITC restrictions under Sec 17.
7. **ITC**- Input Tax Credit means the credit of input tax which is available to an assessee registered under GST subject to certain restrictions as per GST Law.
8. **CAPITAL GOODS**- means goods which are essential part of a business for e.g. Plant and Machinery, Moulds, Dies, Factory Building, Trucks, Cranes, Power Generators etc., the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business.

REFERENCE: CGST Act 2017, 2(63); CGST Act 2017, 2(19)

UNDERSTANDING THE MEANING OR DEFINITION & CONCEPTS OF RELEVANT TERMS

9. **TAX INVOICE-** Bill issued with a proper serial number and details of the entity issuing the bill and receiving the goods, GSTIN details of the entities, Description of Goods or Services or both along with HSN Code / SAC Code, clear and proper description of due tax charged as per the type of supply i.e. intra state or interstate supply on it along with signature of the authorized person.

Information that must be on an invoice:

- (a) Name, address and GSTIN of the supplier;
- (b) A consecutive serial number not exceeding sixteen characters, in one or multiple series, containing alphabets or numerals or special characters hyphen or dash and slash symbolized as “-” and “/” respectively, and any combination thereof, unique for a financial year;
- (c) Date of its issue;
- (d) Name, address and GSTIN or UIN, if registered, of the recipient;
- (e) Name and address of the recipient and the address of delivery, along with the name of State and its code, if such recipient is un-registered and where the value of taxable supply is fifty thousand rupees or more;
- (f) HSN code of goods or Accounting Code of services;
- (g) Description of goods or services;
- (h) Quantity in case of goods and unit or Unique Quantity Code thereof;
- (i) Total value of supply of goods or services or both;
- (j) Taxable value of supply of goods or services or both taking into account discount or abatement, if any;
- (k) Rate of tax (Central tax, State tax, Integrated tax, Union territory tax or Cess);
- (l) Amount of tax charged in respect of taxable goods or services (Central tax, State tax, Integrated tax, Union territory tax or Cess);
- (m) Place of supply along with the name of State, in case of a supply in the course of inter-State trade or commerce;
- (n) Address of delivery where the same is different from the place of supply;
- (o) Whether the tax is payable on reverse charge basis;
- and (p) Signature or digital signature of the supplier or his authorized representative

UNDERSTANDING THE MEANING OR DEFINITION & CONCEPTS OF RELEVANT TERMS

10. INPUTS- It means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business or for providing an outward supply under GST. Example raw material used for making product or material used in packing of goods.

11. INPUT SERVICES- It means any service used or intended to be used by a supplier in the course or furtherance of business.

12. TRANSITION CREDIT - Transition Credit is the ITC available in the credit / cash ledger of the previous indirect tax regime of taxation, which is transferred by the assessee in the GST regime in its credit / cash ledger after filling of TRAN-1 or TRAN-2 Form on the GST portal. Note: In some cases GST dept. has rejected the claim or has partially allowed the claim made in TRAN-1 or TRAN-2 by the assessee, in such cases proper declaration should be made while filling GSTR-9.

REFERENCE: CGST Act 2017, 2(59); CGST Act 2017, 2(60)

UNDERSTANDING THE MEANING OR DEFINITION & CONCEPTS OF RELEVANT TERMS

13. REVERSAL OF CREDIT – ITC which has been availed by the assessee, may be reversed by the GST dept., if it is found that the ITC availed by the assessee is wrongly claimed or the assessee was not entitled to take claim of such ITC. ITC wrongly claimed on goods and services can also be reversed while filing GSTR-9.

14. UTILISATION OF ITC - Utilisation of the balance available in the assessee's cash ledger and credit ledger can be used while discharging the liability of payment of due tax.

15. ITC LAPSED – This term is specific to GST regime. It means the credit which was to be utilised towards payment of outward liability of GST is no more valid due to the reason that the outward supply falls under nil rated category, the assessee cannot take refund of the ITC accumulated in the credit ledger on making such supplies, it is lapsed and cannot be further validly used.

16. INTEREST – Interest leviable on amount of taxable turnover if the tax is not paid on time (18%) or ITC has been availed wrongly (24%).

AMENDMENT TO GST RULE 36(4) FOR RESTRICTING ITC UP TO 10% BY NOTIFICATION FOR MISSED INVOICES

1. The CGST Rules were amended by CGST (Sixth Amendment) Rules, 2019 by Notification No. 49/2019 dt 9.10.2019 it is further amended vide Not No. 75/2019 – CT dt 26.12.2019 and recently by Not No 30/2020-CT dt 3.4.2020.
2. By Rule 3 of the said amendment Rules, sub rule (4) was inserted to Rule 36 for providing - restriction to claim ITC for missed invoices up to 10% (earlier 20%) of the eligible credit available in respect of invoices or debit notes the details of which is uploaded by suppliers

The text of inserted Sub Rule (4) in Rule 36 (latest position) is reproduced hereunder:-

Sub-Rule (4) : Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed **10 per cent** of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.

Substituted for the figures and words [20 per cent] with effect from 1.1.2020 vide Not No. 75/2019 – CT dt 26.12.2019.

AMENDMENT TO GST RULE 36(4) FOR RESTRICTING ITC UP TO 10% BY NOTIFICATION FOR MISSED INVOICES

The effect of the above two amendments dt 9.10.2019 & dt 26.12.2019 is that the registered person i.e. inward supplier can claim ITC only of tax invoices and debit notes up-loaded in Form GSTR1 by his supplier and over and above can claim only additional 10% of the otherwise eligible amount for missed invoices which are not been reflected as uploaded for no fault of the inward supplier.

Recently on 03.04.2020 due to Lockdown condition for COVID 19 the following Proviso is inserted in Rule 36 (4) vide Notification No. 30/2020-CT.

Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in FORM GSTR-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.

The controversy may arise as Section 43A is still not notified, which provides as follows:-

(4) The procedure for availing input tax credit in respect of outward supplies not furnished under sub-section (3) shall be such as may be prescribed and such procedure may include the maximum amount of the input tax credit which can be so availed, not exceeding twenty per cent. of the input tax credit available, on the basis of details furnished by the suppliers under the said sub-section.

CONTROVERIES-GST RULE 36(4) FOR RESTRICTING ITC UP TO 10% BY NOTIFICATION FOR MISSED INVOICES

ITC Restriction - Implications

- Whether Rule can be effective prior to effectuation of the relevant provision in the Act?
- Whether transaction level matching required ?
- Is there a time dimension – how to address quarterly filers ?
- Portal Generated Notices / Inquiries – whether monthly or annually or cumulative ?

10% ITC Restriction : Circular

- The position is not clear about re-credit or previous year's credits as included/declared in GSTR 3B ?
- Only Invoices / Debit Notes routed through GSTR1 which is not applicable for import of goods or import of services or RCM or ISD, etc. – whether restriction is only for credit availed after 9.10.2019 ?
- Calculation on consolidated basis and not supplier wise ?
- Time Dimension – Consider GSTR 2A as on the due date of filing GSTR1 ?

Relaxation on account of COVID-19

The provisions of Rule 36(4) will be applied cumulatively in the month of September 2020

- Whether unmatched credits of prior months can be availed ?
- Whether interest is payable on the reversal required in September 2020 on account of unmatched credit?

RESTRICTIONS UNJUSTIFIED & ILLEGAL

It seems that Government has not given thought to the present provisions of the Act and Rules relating to the claim of ITC and without proper preparation & study proceeded to amend the Rule and restricted the legitimate and legal claim of ITC of genuine and honest tax payers despite the fact that tax due on transaction is paid by the supplier time to time in monthly returns but only for absence of details of such Tax Invoices in GSTR1 of Outward Supplier it is being denied and restricted to the disadvantage of Inward Supplier for non of his fault.

The denial of any dubious or wrongly claimed ITC is justified, but without any details of inward supply in form GSTR2 and matching thereof the Government can not arbitrarily jump to the conclusion that claim of ITC by the recipient in respect of missed invoices is wrong and dubious therefore requires restriction.

Section 16 does not prescribe any specific provision relating to Rule 36 (4). Rule 36 (4) overrides the enabling provisions of Section 16 and thus the Rule 36(4) restricting ITC to 10% is ultra vires.

ITC Restriction in the course or furtherance of business are big hindrance for homogeneous and seamless GST

Section 16 specifies that ITC shall be eligible on all inputs/ input services which are incurred in the course or furtherance of business. However, section 17(5) inserts certain restrictions which leads to cascading effect and disputes.

Relevant Law:

Sec 16 (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.

Sec 17 (5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

(a) motor vehicles and other conveyances except when they are used—

(i)

.....

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

ACTUAL CASE STUDY

ISSUE: *Are Companies eligible to take Input of GST on the Vehicle Purchased by the Company & registered in Company's name for Primary USE as transportation of Company Employees from one location to another location of the company or for exclusive work of business.*

OUR VIEW:

GST Paid on the Car/ Vehicle purchased by the Company & Registered in the name of the company, ITC on the amount paid at the time of purchase will be subject to the Section 17(5) (a) of CGST Act and Input Tax Credit Rules prescribed under GST Law, the proposition of spirit of GST Law which needs to be satisfied for claiming of ITC is that the services / goods inward should be used for the furtherance of business. The same needs to be analysed fairly & judiciously that use of Vehicle even-though for the transportation of the employees of the Company will fall under the condition of the furtherance of business or not. If the company is able to establish the use of the vehicle for furtherance of business then the amount paid as GST at the time of purchase of the vehicle will be available as ITC else no ITC would be available to the Company even though the purchase is made in the name of the Company.

CASE STUDY - WHEN ACTUAL AMOUNT OF CONSIDERATION IS NOT PAID BY THE RECEIPT OF SUPPLY

Whether the claim of 'Input Tax Credit' by M/s XYZ for the supply of Goods or Services under the 'Tax Invoice' issued by company M/s ABC in which legally due amount of GST has also been separately charged in-accordance to the provisions of the Law, even if the consideration (value of supply along with tax payable) of the inward supply is not made by the recipient M/s XYZ.

We need to understand Section-16 of CGST Act and its relevant provisions contained in Sub-Section (1) as well as Sub-Section (2) second & third proviso to Clause (d). I am reproducing herewith Section 16 for your easy understanding.

“Section 16 Sub-Section (2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

Clauses (a), (b) or (c)

(d) he has furnished the return under section 39:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within period of **one hundred and eighty days** from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that **the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.**

RETROSPECTIVE REVERSAL OF ITC BY REAL ESTATE SECTOR

The Real estate companies are required to reverse the proportionate ITC earned by them till 31.03.2019 as per the formula laid down in Annexure I & II of Notification No.03/2019-Central Tax (Rate) dated 29.03.2019 in case they opt for the concessional rate of GST output @5% on non-affordable and @1% on affordable residential apartment.

As per GST law i.e. Chapter V of CGST Act, a registered person is entitled to take ITC to the extent it attributes to taxable supplies including zero-rated supplies. Correspondingly, ITC attributable to exempt supplies needs to be reversed in the prescribed manner.

The moot question that needs to be answered is whether construction services would constitute to be an 'exempt supply' in the first place or not? As per Section 2(47) of the Central Goods and Services Tax Act, 2017 ('CGST Act'), an exempt supply means a supply attracting nil rate of tax or wholly exempt from tax. An exempt supply also includes a non-taxable supply within its ambit i.e. a supply not leviable to tax under GST.

It is pertinent to note that the above definition only includes supply which is wholly exempt from tax. On the other hand, construction services are not wholly exempt from tax but are partly exempt. This is in contradistinction with pre-GST regime wherein the definition of 'exempted service' specifically covered service whose part of value was exempt subject to non-availment of credit. The extension in definition of 'exempted service' in pre-GST regime took place with effect from July 1, 2012; however, such services / supply does not qualify as 'exempt supply' under the GST regime.

RETROSPECTIVE REVERSAL OF ITC BY REAL ESTATE SECTOR

The reversal of ITC in case of construction services can be triggered only when the statute contains a specific provision to that effect. In the instant case as well, a statutory provision dealing with reversal of ITC in respect of partly exempt supply is conspicuously missing for the period till 31.03.2019.

This position of requiring the real estate companies to reverse the ITC which has been rightfully earned by them till 31.03.2019 needs to be revisited by GST council. The proposed mechanism seeking reversal of ITC on procurements made by construction companies till March 31, 2019, cannot be legally enforced in view of absence a specific provision in the Statute.

However, prospectively, Section 11 of the CGST Act and Section 6 of the IGST Act empower the Government to grant full or part exemption subject to conditions, one of which can be ITC reversal. Thus, going forward, non-availability of ITC on procurements post April 1, 2019 is valid.

LITIGATION FOR CLAIM OF ITC UNDER VAT IN SIMILAR CIRCUMSTANCES

The governing section for availability of ITC under the Delhi VAT Act is Section 9(2)(g) which dis-entitles the purchasing dealer from availing the 'Input Tax Credit' if the selling dealer has not deposited the applicable Value Added Tax on his sales invoices with the Delhi State Government has already been subjected to intensive judicial scrutiny by Honorable Delhi High Court. The Hon'ble High Court has held that since Section 9(2)(g) forces the purchasing dealer to do something which is impossible at his end it is a bad piece of legislation and cannot survived the constitutional virus and hence has been quashed and set aside.

The eligibility of ITC to the purchasing dealer under the provision of Section 9(2)(g) of the DVAT Act on ground of mismatch of Annexure 2B has already been settled by the Division Bench of the Jurisdictional ***Honorable Delhi High Court in the case of Onquest Merchandising India P ltd vs Govt of NCT and others in W.P. (C) No.6093/2017 and CM No. 25293/2017 decided on 26.10.2017.***

The Special Leave Petition (SLP) filed by the Revenue against the above High Court's Judgment has been dismissed by the Hon'ble Supreme Court vide its judgment dated 10.01.2018 in Commissioner of Trade and Taxes vs Arise India Limited 2018-TIOL-11-SC-VAT.

With the above settled legal position even though it is under VAT Law, it is very clear that the dis-allowance of the Input Tax Credit under GST due to mis-match in the Returns is not a good Law and therefore the order for demand or reversal of ITC deserve to be set-aside on this ground.

LEGISLATIVE INTENT & JUDICIAL PRECEDENTS -

ITC Claim / Benefit cannot be deprived

Legislative intent: As per para 18.3 of the minutes of **28th GST Council** meeting held on 4.8.2018 in New Delhi which stated as follows:

“18..... There would be **no automatic reversal of input tax credit at the recipient's end where tax had not been paid by the supplier**. Revenue administration shall first try to recover the tax from the seller and only in some exceptional circumstances like missing dealer, shell companies, closure of business by the supplier, the input tax credit shall be recovered from the recipient by following the due process of serving of notice and personal hearing.”

1. Hon`ble Karnataka High Court in a writ petition filed by M/s ONXY Designs Versus The Assistant Commissioner of Commercial Tax Bangalore 2019(6) TMI 941 relating to Karnataka VAT has held that

*“It is clear that the **benefit of input tax cannot be deprived to the purchaser dealer if the purchaser dealer satisfactorily demonstrates that while purchasing goods, he has paid the amount of tax to the selling dealer**. If the selling dealer has not deposited the amount in full or a part thereof, it would be for the revenue to proceed against the selling dealer”*

JUDICIAL PRECEDENTS- TRAN 1 Claim of c/f ITC

2. Section 16, 140, 142 of CGST Act 2017, Rule 117 of CGST Rules 2017

Punjab and Haryana High Court found various petitions filed with identical issues on form TRAN-1. The issue in all the petitions were related to 'permission to be granted to carry forward the unutilised CENVAT credit of duty paid under Excise Law and ITC of VAT, to the current GST regime'. The court identified two major causes, which are :-a) registered person could not file TRAN-1 and have no evidence of attempt to upload the same; b) There are mistakes and the registered persons wanted to revise TRAN-1 which have been already uploaded. The court gave its decision in favour of the petitioners on the following basis:

- 1) There is **no provision that provides for ITC to lapse**;
- 2) Since, **GST is new law with lot of technological advancements**, there is high possibility of mistakes;
- 3) **Denial of credit is violation to Article 14** of the Constitution and will be very arbitrary;
- 4) **A going concern to have 'legitimate expectation'** that it will be allowed to carry forward and utilise the CENVAT credit and be treated in a certain way;
- 5) **The loss of credit will diminish the working capital** of the petitioners which is violation to Article 19 (1) of the Indian Constitution;
- 6) **Liability to pay GST on sale of stock carried forward will lead to double taxation**, which is completely irrational.

The court ordered that "TRAN-1 to be submitted electronically or manually and respondent to verify the genuineness of the claim but nobody will be denied to carry forward legitimate claim of ITC and CENVAT credit".

Adfert Technologies Pvt. Ltd Vs. Union of India CWP No.30949 of 2018(O&M); TS-942-HC-2019(P&H)-NT

JUDICIAL PRECEDENTS- TRAN 1 Claim of c/f ITC

3. Rule 117 of the Central Goods And Services Tax Rules, 2017

The Petitioner could not file Form GST TRAN-1 on account of the technical glitches in terms of poor net connectivity and other technical difficulties on the common portal. Accordingly, they had to physically lodge their claim of transitional credit on stock in Form GST TRAN-1 and GST TRAN-2 respectively with their Jurisdictional Officer. The office of the Nodal Officer alleged that the petitioner had neither tried for saving/submitting or filing the Form GST TRAN-1 as per the GST System Logs. The Court in the matter has allowed the Petitioner to file declaration in form GST TRAN-1 and GST TRAN-2 and held that, **the due date contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit is procedural in nature and thus should not be construed as a mandatory provision.**

Siddharth Enterprises vs. Nodal Officer [TS-684-HC-2019(GUJ)-NT]; [2019] 109 taxmann.com 62 (Gujarat)

4. Section 140(3) CGST Act, 2017

Petitioner uploaded TRAN-1 but credit ledger did not reflect the correct credits available and rather reflected no credit figure available to it at all. The **court directed the respondent to either open the portal for the petitioner to file Tran-1 again or accept it manually.**

Bhargava Motors vs. Union of India [2019] 102 taxmann.com 127 (Delhi), 2019-TIOL-1060-HC-DEL-GST

JUDICIAL PRECEDENTS- Bogus Billing, Circular Trading-Arrest

5. Section 69 CGST Act, 2017

Petitioners have made bogus billing and adjusted the amount without any transportation of the goods or sale of goods. Arrested the petitioner and denied their bail in GST fraud. Court held that allegation of bogus billings, adjustments of amount without any transportation or sale of goods, etc., and **only paper transactions adjusted and wrongly claimed relief** of more than Rs. 80 crores, are **justifiable grounds to arrest the petitioners**.

Vikas Goel and Another vs. CGST Commissionerate 2019-TIOL-445-HC-P&H-GST, MANU/PH/2304/2018

6. Section 69, 70, 132 CGST Act, 2017

Petitioner has been alleged of **circular trading and evasion of taxes for claiming ITC on input never purchased**. This ITC is passed to the companies to whom the supply has actually not been made. The petitioner was arrested and he **raised the objection that there is no necessity to arrest a person for an alleged offence which is compoundable**. The High court rejected the argument and dismissed the petition. The same was filed as an SLP in Supreme Court and was dismissed again.

P.V. Ramana Reddy Vs Union of India & Ors. 2019-TIOL-873-HC-TELENGANA-GST; SC- 27.05.2019 SLP (CRL) 4430/2019

JUDICIAL PRECEDENTS - Uniform Tax & Right to un-utilised ITC

7. Section 17(5) of the CGST Act 2017: The purpose of the Act is to make uniform taxation. The High Court was dealing with the issue of availability of **ITC on construction of building used for further letting out**. The High Court rejected the contention of the tax authorities and held that **the property cannot be said to be used by the petitioner 'on his own account'** where it lets out the same to various tenants for their use. GST will be paid as outward supply on sale of immovable property (before issuance of completion certificate) and also the rental of immovable property. **The Court made it clear that ITC is available for rent out and not available for property used by self.**

Safari Retreats Private Limited v. UOI, 2019-VIL-223-ORI; TS- 350-HC-2019(ORI) – NT

8. Section 54 CGST ACT, 2017: This is case where the **inverted tax structure refund of excess duty** is not granted. There being **no express provision in section 54(3) empowering Central Government to provide for lapsing of unutilised ITC**, petitioners have a **vested right to the unutilised ITC accumulated on account of rate of tax on inputs which are higher than rate of tax on output supplies.**

Shabnam Petrofils (P.) Ltd. v. Union of India [2019] 108 taxmann.com 15 (Gujarat); R/SPECIAL CIVIL APPLICATION NO. 16213 of 2018, R/SPECIAL CIVIL APPLICATION NO. 20626 of 2018

JUDICIAL PRECEDENTS- LACK OF MECHANISM & ITC IS ONLY FOR OUTWARD LAIBILITY

9. **Section 54 CGST Act 2017:** The GST law provide for re-credit of ITC on rejection of refund claim under GST RFD-PMT 03. However, **GST portal did not have functionality** regarding the same. The Court held that the revenue cannot deny re-credit of the amount on account of **lack of mechanism** on GST portal. Accordingly, the taxpayer was given option to take credit of the said amount manually in its return in case such amount is not credited electronically.

Garden Silk Mills Limited v. UOI, 2019- VIL-165-GUJ; MANU/GSCU/0028/2017

10. **Sec. 47, 49, 50 of CGST Act, 2017:** The inputs available for outward supply is available in the clouds. Only when the payment is so made, the Government gets a right over the money available in the ledger. In case of delayed payment of tax, the liability to pay interest arises which cannot be escaped from. Since **ownership of such money is with the dealer till the time of actual payment**, the Government becomes entitled to interest upto the date of their entitlement to appropriate it. Court held that **ITC can be used for payment of tax for filing of return only**, when it is set-off with output liability. And thereby the interest is payable when the tax is not paid timely. **ITC cannot be used to pay interest.**

Megha Engineering and Infrastructures Limited v. Commissioner CGST, 2019-VIL-175- TEL; 2019 (4)

 *TMI 1319, TS-248-HC-2019 (TEL and AP)-NT, MANU/TL/0041/2019* 

Contemporary and/or contentious issues in GST which can be redressed through Judicial Process

- 1) Whole or part of Transitional Credit not carried forward for any reasons;
- 2) Pending refund of ITC arising on account of export or inverted tax structure;
- 3) Re-credit of rejected refund of ITC arising on account of export or inverted tax structure;
- 4) Interest or compensation on delayed refund of ITC arising on account of export or inverted tax structure;
- 5) Challenge to vires of Rule 89(5) of the CGST Rules, which does not allow refund of ITC on input services and capital goods in the case of inverted tax structure;
- 6) Challenge to vires of Rule 89(4) of the CGST Rules, which does not allow refund of ITC on capital goods in the case of exports;
- 7) Constitutional validity of Notifications and Circulars levying GST after 01.03.2019 on development rights on unsold stock on the date of issue of completion certificate under reverse charge mechanism on the developer;
- 8) Constitutional validity of Notifications and Circulars levying GST on development rights prior to 01.03.2019 on the landowner;
- 9) Any issues arising out of technical glitches on the common portal.

Contemporary and/or contentious issues in GST which can be redressed through writ petition before High Court

- 10) Constitutional validity of Section 16(2)(c) of the CGST Act which seeks to deny ITC to a buyer of goods or services, if the tax charged in respect of supply of goods or services has not been actually paid to the Government by the supplier of goods or services;
- 11) Constitutional validity and vires of Section 43A(4) of the CGST Act and Rule 36(4) of the CGST Rules, to the extent that it seeks to restrict ITC available to a buyer of goods or services to the extent of 10% of the eligible credit, if invoices are not uploaded by the suppliers on the portal;
- 12) ITC blocked on portal by the department for non payment of tax or non filing of return by supplier;
- 13) Demand of interest on gross liability for late filing of GSTR 3B returns;
- 14) Constitutional validity of Section 28 of the Central Goods and Services Tax (Amendment) Act, 2018 which seeks to retrospectively disallow the transition and carry forward of CENVAT Credit of EC, SHEC and KKC into the GST regime.
- 16) Freezing of bank accounts in the course of any enquiry/investigation proceedings.
- 17) Notice demanding reversal of ITC for availing credit after date prescribed in Section 16 of the CGST Act.
- 18) Seizure/confiscation of goods or conveyances and levy of penalty and /or fine in lieu of confiscation without following due process of law.
- 19) Anticipatory bail/bail in the course of any enquiry/investigation proceedings.



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